Office Supreme Court, U. S.
FILED
SEP 28 1921
JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. [redacted]88

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLEES

J. D. HANK,
Assistant Attorney General of Virginia.

ROBERT W. SHULTICE,
Counsel for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 302.

J. W. HURLEY, APPELLANT,

vs.

THE COMMISSION OF FISHERIES OF VIRGINIA ET AL.

BRIEF FOR APPELLEES

Statement of the Case

From the time when the transportation facilities of this country enabled fresh oysters to be marketed in the centers of population, there has been a contest in the State of Virginia between two large classes of people engaged in the oyster industry. One class known as Planters, whose business it is to buy small oysters and distribute them upon selected areas under the public waters of the state, where they grow to

marketable size. The other class are known as Tongers, and it has always been the business of these people to go out on the unoccupied bottoms and catch oysters from the public grounds, some of which are disposed of to market boats and some to the planters. These two classes came into existence on account of the natural condition of the grounds under the tidal waters in Virginia, some of which grounds have always grown oysters naturally, and some have not.

From the earliest times almost, the law makers of the state have recognized this condition under the salt waters of the state, and have protected the tonging class by statute law, and by constitutional provisions. By section 175 of the Code of Virginia, it is provided: "The natural oyster beds, rocks and shoals in the waters of this state, shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of this state, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may from time to time define and determine such natural oyster beds, rocks or shoals by surveys, or otherwise".

At first the oyster bottoms desired for planting purposes were not rented by the state to individuals, but were taken up, staked off and occupied by citizens desiring to go into the planting business, and so long as this business was, in a certain sense, not extensive, the custom was free from objection, but as the planting grounds became more in demand, the state, about the year 1871, passed a law requiring these grounds to be rented from the state at a nominal rental of twenty-

five cents per acre per year. This law was passed more for the purpose of preventing disputes than for the trifling revenue derived. The term given the renter was very short, and was subject to change by the General Assembly.

Between 1871 and 1892 disputes became frequent between the two great classes of people engaged in the oyster industry in the state of Virginia. The tongers complained that the planters were encroaching more and more upon the public rocks, and the Legislature of Virginia, for the purpose of putting these troubles forever at rest, in 1892 and 1894 passed acts of vital importance to the oyster business, by which planters were permitted to obtain assignments of grounds suitable for planting, for a period of twenty years, and all natural oyster rocks, beds and shoals were to be surveyed, platted and marked so that they could be kept forever for the use of that large body of citizens engaged in catching oysters on them in their small boats from day to day throughout the oyster season. It was intended that these public rocks should be forever held in trust for the benefit of that class of people.

In pursuance of this law, the Federal Government loaned the State of Virginia a vessel and the services of Mr. Baylor, a thoroughly competent and efficient gentleman, who laid off all of the public grounds in the state, made plats of them, and these plats were filed in the various clerk's offices of the tidewater counties, the grounds so surveyed were marked, not only with stakes stuck in the land under the water, but by permanent marks on the shores. In pursuance

of the law, the county courts of each county appointed citizens of the several counties, familiar with the oyster grounds in their respective counties, to go out with Mr. Baylor and his assistant engineers and show them what were suitable for planting purposes, and what were natural oyster rocks, beds or shoals.

The entire statute was well considered and is one of the wisest pieces of legislation ever enacted in the State of Virginia. It was the outgrowth of bickerings that had filled the courts of Tidewater for twenty years, and was designed to protect the rights of both classes of citizens engaged in the oyster industry.

Among other provisions of the statute, is the following: "Said survey and report, when so filed, shall be, and construed to be, in all the courts of this Commonwealth, as conclusive evidence of the boundaries and limits of the natural oyster beds, rocks and shoals lying within the waters of the counties wherein such survey and report are filled; provided that if any natural oyster bed, rock or shoal is left out of these surveys, they shall not be used for planting grounds, but shall be subject to the general oyster laws of the state". The latter part of this provision was later eliminated; so that all grounds within the Baylor Survey are conclusively natural rock, and all without are open to renters for the planting and propagation of oysters.

Very shortly after the completion of the "Baylor Survey" in 1894, a number of small parcels of oyster ground in Middlesex County, both East and West of

the mouth of Urbanna Creek, were taken up by citizens of that county, and proper assignments were made to them by the then Oyster Inspector of that district. These oyster planting grounds sometime afterwards came by various assignments into the possession of and became the property of the appellant, J. W. Hurley. The evidence conclusively shows that before these various parcels of ground became the property of the appellant, the stakes had been moved out into the river and stuck upon and into the natural rocks lying adjacent to said grounds. The affidavit of A. S. Segar (page 40 of record) shows the very day on which a portion of this natural rock was taken up by a man named Wagner, then the owner of a portion of the ground now in the possession of the appellant. (See also the affidavits of O. J. Palmer, pages 41 and 42, and John Webb, pages 43 and 44).

It is true that these parcels of natural oyster rock were in the possession, though wrongfully, of citizens of the state before Mr. Hurley acquired them, but it is also clearly shown by the evidence that such possession was a matter of common knowledge and general complaint in the neighborhood. It is also shown that the appellant took over these grounds without having a survey made, or without having the records in the clerk's office of Middlesex County examined to ascertain the title to the ground and the extent thereof, although the Baylor Survey for Middlesex County was recorded in said clerk's office, and certainly showed the marks on the shore by which the lines could easily have been established.

It is, of course, true that the original stakes had long since been eaten away by the salt water worms, but numerous affidavits show that parts of the stakes underneath the water were still visible, and that the remains of an old watch house were clearly to be seen.

The appellant remained in possession of this public oyster rock for at least fifteen years, during which time he paid rent only on the ground properly assigned, which consisted of 47.48 acres, although he had in his possession 91.05 acres, part of which had never been surveyed or assigned to him, and to which he could acquire no title whatsoever.

Some time in the Summer or Fall of 1918, complaint was made to the Commission of Fisheries of Virginia by ten citizens of the county of Middlesex, supported by a proper bond as required by the statute providing for such a complaint. In November, 1918, the Commission of Fisheries sent Mr. F. E. Ruediger, its engineer, to Urbanna and directed him to report to Mr. J. W. Hurley, the Appellant. He did so, told Mr. Hurley what his mission was, and Mr. Hurley sent a man in a boat with him to show the lines of the ground occupied and claimed by the appellant. In accordance with the lines so shown the engineer, a survey was made. Mr. Hurley upon seeing the plat said that the outshore part of the ground was his, but that he had made application for the inshore part. Upon a careful investigation of the records, however, the engineer ascertained that the inshore part was the part that had been assigned to the appellant's assignors, and that no part of the outshore territory, that

is, that portion of it lying within the Baylor Survey, had ever been assigned either to the appellant or to any under whom he claimed.

After these facts had been clearly ascertained, the appellant made application to be heard by the Commission of Fisheries of Virginia, that time might be given him within which to remove the oysters and shells planted by him upon the 30½ acres of natural rock found by the engineer to be in his possession. On the 16th of December, 1918, this application was heard at Norfolk, Va., by the Commission of Fisheries, and on the 20th of the same month it was refused. Application was then made for a re-hearing, and the Commission of Fisheries went to Urbanna, Middlesex County about the middle of February, 1919, that all witnesses for the appellant might be heard in person, and that appellant might have full opportunity of presenting any facts that would entitle him to a period within which to remove his oysters and shells from the 30½ acres of natural rock in his possession. At this trial the appellant was represented by Counsel, and after a full hearing and argument of the case the Commission of Fisheries on the 18th of February, 1919, refused the petition of the appellant, and ordered the natural rock to be turned out for the use of that class of citizens who, under section 175 of the Code of Virginia, had been deprived of its use for more than fifteen years. Shortly after this decision was mailed to the appellant, this suit was instituted.

ASSIGNMENTS OF ERROR.

Five grounds of error are assigned by the appellant, but upon examining them, they will be found to involve only one question—whether the order of the Commission of Fisheries of February 18th, 1919, in denying the petition of the appellant and ordering the 30½ acres of natural rock in his possession to be turned out to the public as a part of the Baylor Survey, was such a taking of property without due process of law, as falls within the inhibition of the 14th amendment of the Constitution of the United States.

ARGUMENT.

By section 39 of the Acts of Assembly, 1916, now section 3257 of the Code of Virginia, 1919, it is provided as follows:

"Sec. 3257. *Surveying and Resurveying Planting Grounds; and Marking Lines of Survey of Natural Oyster Rocks*—The Commission of Fisheries is hereby authorized and empowered to select and appoint, on such terms as may be agreed upon, any surveyor, or surveyors, to survey, or resurvey, any oyster-planting grounds, either in his own or any other county and to re-establish and permanently mark any line or lines of the Baylor Survey, of natural oyster rocks, which, in the judgment of the Commission of Fisheries, it may be necessary to define; or an application may be made to the Commission of Fisheries by ten citizens of the county to have any line or lines of the Baylor survey re-established and permanently marked, provided a bond and security be given to the Commission of

Fisheries that the applicants will pay all costs for surveying and marking; and provided further, that ten days' notice of such survey shall be given to all parties whose legal oyster tenures might be directly affected thereby, and if it should turn out that is was not necessary, in the opinion of the commission, to have said line or lines re-established, then all costs of the survey and marking shall be borne by the applicants; but if it shall appear that the Baylor survey had been encroached upon, then the cost shall be borne by the Commission of Fisheries and the bond given be void. (1910 p. 543, §39)."

This is the statute under which the Commission of Fisheries proceeded to have the ground involved in this suit, surveyed for the purpose of ascertaining whether it was natural oyster rock or not, and the only deviation from the statute was that ten days' notice was not given to the appellant before the Commission's engineer went upon the ground, which seems to be contemplated by the statute, where a renter's *legal tenure* is to be affected, but it is submitted in the instant case that the legal tenure of the appellant was not in any way affected by this survey, and no effort was made, except to dispossess him of the illegal possession he had enjoyed for more than fifteen years. After the order of February 18th, 1919, had been entered, his legal tenure was just what it had always been, and no effort was made at any time to interfere with any legal rights enjoyed by the appellant.

We submit further that any notice the appellant may have been entitled to was waived by him, because

before the survey was begun, Mr. Reudiger waited upon him, told him what his business in Middlesex County was, and Mr. Hurley sent him upon the ground in the care of one of his employees that he might be shown the true positions of the lines claimed by the appellant. There is nothing of importance in the ten days' notice, even if Mr. Hurley's legal tenure had been at stake. The appellant had due notice of the surveyor's business and assisted him in making the survey. After the survey was made, the plat was shown him, he made suggestions in regard to it, and the plats recorded in the clerk's office under which the appellant claimed, were checked with the plat made by Mr. Reudiger, and then, after the appellant could no longer deny the illegality of his position, he made application to the Commission of Fisheries for time within which to remove his oysters from the 30½ acres of ground, which by the very petition itself, he admitted to be illegally in his possession.

The statute under which he proceeded is section 15, of the Acts of 1916, Section 3233 of the Code of Virginia, 1919, and is as follows:

"Sec. 3233. *Resurveys of Planting Grounds.*—When, by any resurvey of oyster-planting grounds or survey made to re-establish the lines of the State survey of natural oyster beds, rocks or shoals, which shall hereafter be made under the direction of the Commission of Fisheries, it shall appear that any holder, without his own default, and by mistake of any officer of the State, has had assigned to him and included in the plat of his assignment any portion of the natural oys-

ter beds, rocks or shoals as defined by law, and it shall further appear that such holder has oysters or shells planted on the said ground, then, before the stakes shall be removed from said ground or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, in their discretion (and duly advertised), within which to remove his planted oysters or shells from the said ground, and any person other than the said holder, his agents or employees, going upon the said ground and taking oysters or shells therefrom before the expiration of the time allowed said holder, shall be deemed guilty of larceny thereof and shall be punished as provided by this chapter for the larceny of oysters. (Id., §15)."

Had the appellant objected to the notice given him, he should have proceeded in a different way, but he admitted the legality of the notice, and the correctness of the survey, and early in December, 1918, he came before the Commission of Fisheries with his petition, asking to be allowed further time within which to remove the oysters and shells alleged by him to have been planted upon the 30½ acres of natural rock which he held. There were two hearings, the second one at the place where the ground involved in this suit is located. This was done to enable the appellant to produce all necessary witnesses, records and papers before the Commission, and after a long and full hearing upon this petition, the Commission promulgated the order of February 18th, 1919. This order directing the stakes to be removed from the natural rock and ordering this 30½ acres of ground not

rented by the appallent, to be turned out to the citizens of the state, is the order complained of, and it is alleged that this is a taking of the appellant's property without due process of law and the taking of private property without compensation contrary to the Constitution of the United States.

It will be observed that the section of the law relied upon by the appellant gives discretionary powers to the Commission of Fisheries only in certain specified cases. It provides that where a holder of ground "without his own default, and by mistake of any officer of the state, has had assigned to him and included in the plat of his assignment any portion of the natural oyster beds, rocks or shoals, as defined by law, and it shall further appear that such holder has oysters and shells planted on the said ground, then before the stakes shall be removed from said ground, or the same opened to the public, the said holder shall be allowed a reasonable time, the length of which is to be determined by the Commission of Fisheries, etc."

The Commission, as shown by its order, construed this statute as giving it no authority to extend the time of one to take oysters from the public rocks, unless the ground had been assigned to him, was included in his plat and that this had been done without default upon his part and by mistake of an officer of the state of Virginia. Not only do not all of these occur in the case under discussion, but none of them were shown to have occurred. The appellant had taken the ground without having a survey made, or the title examined. No assignment of this 30½

acres had ever been made to him, or to those under whom he claimed, and he was found to be in possession of all the ground to which he was entitled under his assignments, with this ground excluded from his boundaries. Not only was this clearly shown, but an examination of the plats demonstrated the fact that the assignments conformed on their offshore lines to the lines of the Baylor Survey, and that the stakes had been carried out and extended parallel with the Baylor Survey line, so as to show a set purpose on the part of some one to so copy the general direction of that line as to deceive the eye of any one examining that ground, and create the belief that the outshore line of the occupied ground was the inshore line of the Baylor Survey.

The object of this Statute was to protect those who were honestly mistaken in their rights, and who had been misled by the carelessness or inefficiency of any state officer, and had expended their funds in planting oysters through such mistakes upon the public bottoms, and the only discretion given the Commission of Fisheries is to prescribe the time such persons may have for removing their property from that portion of the public domain so honestly and mistakenly occupied by them.

The court below has said in its opinion:

"The statute does not take away any property or injure any property right; on the contrary it confers rights on the conditions set out. When the state creates and confers rights not before in existence it may

attach to them any conditions, and those who claim the benefits of the statute must accept its conditions.

Cooley's Constitutional Limitations, 181. Since the bill, affidavits and exhibits show that the complainant has no property right, either at common law or under the statute, to be taken without compensation or without due process of law, he is not injured by any of the statutes relating to the matter, and will not be heard to assert their invalidity. McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U. S., 151; Louisville & Nashville R. R. Co., v. Finn 235 U. S. 601; Jeffrey Mfg. Co., v. Blagg, 235 U. S., 571; Hendrick v. State of Maryland, 235 U. S., 610; Mallinckrodt Works v. St. Louis, 238 U. S., 41; "and at page 54 of the record, the court has also said:

"The complainant cannot be heard to allege the unconstitutionality of a statute he has himself invoked and relied on. Williams v. Eggleston, 170 U. S., 304; Chicago &c., Railroad v. Nebraska, 170 U. S., 57; Kansas City, &c., R. R. Co., v. Stiles, 242 U. S., 111; Kryger v. Wilson, 242 U. S., 171."

A case similar to the one under discussion, and cited with approval by the court below in this case, is that of Commission v. Hampton Roads Oyster Company, 109 Va., 565. In that case, the oyster inspector representing the state, had improperly assigned certain ground to the Hampton Roads Oyster Company. After a survey was made, this company on account of the ground having been assigned to it by an officer of the state, was given a period of time within which to remove these oysters. This period was extended

at the request of the occupant, and later a further request was denied. An injunction was obtained, and the same reasons were alleged as in the case under discussion. At page 578 the Supreme Court of Appeals of Virginia says:

"The wisdom of the legislature in giving to a survey and report of the oyster-beds, rocks and shoals in the waters of the Commonwealth, the probative force and effect that it did, is demonstrated by the wide range this litigation and the evidence relied on in support of appellee's contentions have taken. There would be no end to litigation concerning the limits of the Baylor survey, if the appellant, the Commission of Fisheries, could be called on to litigate in the courts the correctness of every survey re-establishing a line or lines of the Baylor survey, and that question to be determined upon a mere preponderance of the evidence that might be adduced. It was plainly the purpose of the legislature to put an end to such litigation by establishing a final arbiter of all questions as to the location of a line or lines of the Baylor survey, and to relieve the officers of the State in charge of the oyster industry from litigation in the courts concerning the same."

And further at page 582, the same court says:

"The view that the Baylor survey, and the Edmonds-Baker survey re-establishing the lines of public ground No. 1, in Nineteenth district, Nansemond county, as surveyed and located by the Baylor survey and report, are conclusive and could not be challenged

by subsequent proceedings in court, is sustained by the Supreme Court of the United States in Gardner v. Bonestell, 180 U. S., 362, 45 L. Ed. 574; 21 Sup. Ct., 399, where it was held: "It is a well settled rule of law that power to make and correct surveys of public lands belongs exclusively to the political department of the government, and that the action of that department within the scope of its authority, is unassailable in the courts, except by a direct proceeding. The determination by the land department in a case within its jurisdiction of questions of fact depending on conflicting testimony is conclusive, and cannot be challenged by a subsequent proceeding in the courts".

And in a still later case, Bates & Guild Co., v. Payne, 194 U. S., 106, 48 L. Ed. 894, 24 Sup. Ct., 595, the same court held that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they have the power and will occasionally exercise the right of so doing. In the course of the opinion it is said: "It has long been the settled practice of this court in land cases to treat the findings of the land department upon questions of fact as conclusive, although such proceedings involve, to a certain extent, the exercise of judicial power. As was said in Burfenning v. Chicago, St. Paul, &c., R. R., 163 U. S., 321; 41 L. Ed. 175, 16 Sup. Ct.. 1018:

"Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, depending on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions, is conclusive and not open to litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined." Citing with approval Gardner v. Bonestell, supra.

The court below, after having commented upon the case of Commission v. Hampton Roads Oyster Company, 109 Va., 565, and approving the conclusions in that case, that the Baylor survey was made by the statute conclusive evidence of the area of the natural oyster grounds of the state, and that the statutory enactment to that effect was constitutional, proceeds to discuss those principles and apply them to the instant case. The language of the opinion is as follows:

"The correctness of these conclusions is made so clear both on principle and authority by the reasoning of the court and the authorities cited, that further discussion would be superfluous. The complainant having under the common law no legal interest in the land or the oysters could not allege the statute under which the Commission of Fisheries ordered the natural oyster land opened to the public to be unconstitutional, on the ground that it did not provide that he should have notice and a hearing. Having by the common law no property in the oysters planted, complainant had nothing to be compensated for, or to be protected

by due process of law, unless he can show a property right conferred by the statute law of Virginia."

The court below concludes its opinion denying the injunction and revoking the temporary restraining order as follows:

"Fortunately this conclusion works no hardship on the complainant. Taking the most favorable possible view of his case he has no substantial equity. The land from which he has unlawfully excluded the public has never been assigned to him or his predecessors and no rent has been paid for it. The total area claimed by him and in his possession as ascertained by Reudiger's survey is 91.05 acres. The bill alleges he has been paying rent on 47.48 acres in two tracts, 21.98 acres and 25.5 acres. This taken from the 91.05 in his possession leaves more than the 36.50 acres of natural oyster ground in his possession for which he has paid no rent.

"Nor will there be any unjust advantage to the state or the public in opening this natural oyster ground to the public. True complainant planted the oysters and will be deprived of the exclusive right to gather them; but it is also true that he has for fifteen years appropriated to his own use all the natural oysters on the land which were the property of all the people of the state." Which is not only a brief and accurate resume' of the facts and correct determination of the principles of law involved in this litigation, but a

most happy way of showing that loss has been entailed upon no party to the litigation in the working out of complete justice to all.

Respectfully submitted,

J. D. HANK,
Assistant Attorney General of Virginia.

ROBERT W. SHULTICE,
Counsel for Appellees.